

Headquarters Policy Flash

FLASH 2001-16

DATE: May 25, 2001
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, MA-51
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Letter (AL) 2001-03, Costs Associated with Whistleblower Actions**

SUMMARY: This Flash provides a summary of guidance contained in AL 2001-03 for implementing the requirements contained in the Final Rulemaking on Whistleblower Costs published in the *Federal Register* on October 18, 2000 (65 FR 62299). The AL also establishes procedures and points of contact for consulting with counsel and providing information to Headquarters on allowability determinations.

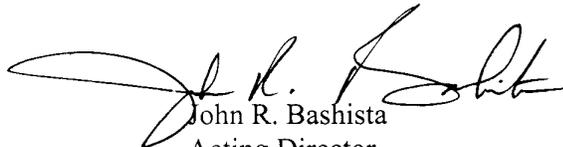
A copy of the AL is attached. It can also be viewed and downloaded at <http://www.pr.doe.gov/acqltr.html>.

FLASH 2001-16
(MAY 25, 2001)

The Department has established a whistleblower costs' point-of-contact in the Office of General Counsel, the Office of the Assistant General Counsel for Procurement and Financial Assistance (GC-61). Contracting officers, or their designated representatives, must consult with counsel before making an allowability determination on costs associated with whistleblower actions as specified in the regulation. Consultation with local counsel will satisfy this requirement.

Contracting officers are required to report their final allowability determinations, and the analysis or basis for their determinations, to the Office of Procurement and Assistance Management. The information will promote an evenhanded approach, avoid unwarranted variation across the Department's complex of facilities, be a resource for providing lessons learned, and guidance to contracting officers. The final report, in the form of an electronic copy of the contracting officer's written final determination, must be e-mailed to: whistleblowers@hq.doe.gov.

Questions concerning the AL may be directed to Terry Sheppard at (202) 586-8193, or by e-mail at: terry.sheppard@hq.doe.gov



John R. Bashista
Acting Director

cc:
PPAG Members

Attachment:
AL2001-03



Department of Energy
Acquisition Regulation

No. 2001-03
Date May 25, 2001

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA.

Subject: COSTS ASSOCIATED WITH WHISTLEBLOWER ACTIONS

References:

DEAR 931.205-47(h)
DEAR 952.216-7, Alt II
DEAR 970.3102-05-47(h)
DEAR 970.5232-2, Payments and Advances

When Does this Acquisition Letter Expire?

This Acquisition Letter will expire when this guidance is distributed as an Acquisition Guide section or otherwise superseded.

Whom Do You Contact for More Information?

Contact Terry Sheppard of the Office of Procurement and Assistance Policy at (202) 586-8193 or terry.sheppard@hq.doe.gov

Visit our website at www.pr.doe.gov for information on Acquisition Letters and other policy issues.

What is the Purpose of this Acquisition Letter?

The purpose of this AL is: (1) to provide contracting officers guidance to implement the requirements contained in the Final Rulemaking on Whistleblower Costs published in the Federal Register October 18, 2000, 65 FR 62299; and (2) establish procedures and points of contact for consulting with counsel and providing information to Headquarters on allowability determinations.

What is Required in the New Regulation?

The new regulation requires contracting officers to determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and relevant facts and circumstances, including federal law and policy prohibiting

AL-2001-03 (05/25/01)

reprisal against whistleblowers, available at the conclusion of the employee whistleblower claim. The cost principle addresses only the costs associated with whistleblower retaliation claims filed in Federal and state courts and with Federal agencies under 29 CFR Part 24, 48 CFR (FAR) subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239.

The regulation also requires the Department to establish a whistleblower costs point-of-contact in the Office of General Counsel (the GC point-of-contact). Contracting officers, or their designated representatives, must consult with counsel before making an allowability determination on costs associated with whistleblower actions as specified in the regulation. The purpose of this requirement is to promote an evenhanded approach and to avoid unwarranted variation across the Department's complex of facilities.

Contracting officers are required to report their final allowability determinations, and the analysis or basis for their determinations, to the Office of Procurement and Assistance Management. The information will also be a resource for providing lessons learned and future guidance to contracting officers.

How will this new regulation be implemented in contracts?

The amended coverages at DEAR 931.205-47(h) and DEAR 970.3102-20 were published in the *Federal Register* (Vol 65, No. 202), October 18, 2000 with an effective date of November 17, 2000 and must be included in all solicitations issued on or after that date for both M&O and non-M&O contracts. A subsequent rulemaking, 65 FR (December 22, 2000), moved the material at DEAR 970.3102-20 to DEAR 970.3102-05-47(h). The contracting officer may apply the changes to existing solicitations for M&O and non-M&O contracts provided award of the resulting contract(s) occurs on or after the effective date.

Contracting officers must apply these DEAR changes to: contracts extended in accordance with the Department's extend/compete policies and procedures (DEAR 917.6, DEAR 970.1702-1(a)), and internal guidance; and options exercised under competitively awarded M&O contracts (DEAR 970.1702-1(b)).

Contracting officers may, after consulting with the Office of Procurement and Assistance Policy apply these DEAR changes to existing contracts.

In order to implement the new cost principle for non-M&O cost reimbursement contracts, contracting officers must include DEAR 952.216-7, Alternate II. This will ensure that when the allowability of costs is determined in accordance with part 31 of the Federal Acquisition Regulation (FAR), allowability shall also be determined in accordance with part 931 of the Department of Energy FAR Supplement.

Who is the Office of General Counsel Point-of-Contact?

The Office of the Assistant General Counsel for Procurement and Financial Assistance (GC-61) will serve as the GC point-of-contact. The regulation currently makes consultation with the GC point-of-contact mandatory. Contracting officer consultation with local counsel will also satisfy this requirement. Local counsel, when consulted instead of the GC point-of-contact, will determine whether further consultation with Headquarters is required. The GC point-of-contact will assist contracting officers, their designated representatives, and local counsel by providing summaries of relevant cases of Board of Contract Appeals decisions and other guidance material. The GC point-of-contact will consult with the General Counsel for NNSA when a NNSA site is involved, and with other Headquarters and program offices, including the Office of Environment, Safety and Health, and the Offices of Procurement and Assistance Management, when coordination is appropriate, based on the information provided about the case.

What is the Procedure for “Consulting” with the GC Point-of-Contact?

The contracting officer, or a designated representative, must consult with Headquarters GC or local counsel. Consultation with Headquarters GC should be requested electronically to: whistleblowers@hq.doe.gov

The following information may be useful in any request for consultation:

- S Type of action:
 - (Federal or state court, or administrative action under 29 CFR Part 24, 48 CFR subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239)
- S Breakdown of costs submitted for reimbursement, including settlement costs and any of the following categories if applicable:
 - (A) Employee back-pay award:
 - (B) Damages, if any, awarded to employee, and whether they are compensatory or punitive:
 - (C) Employee legal fees reimbursed:
 - (D) Contractor legal fees reimbursed:
- S Any particular provisions in the contract addressing the pertinent cost and if there are any reasons why the costs should be treated or funded any differently than as a normal cost:
- S Key facts or circumstances which may be pivotal in determination of allowability or unallowability:
 - (For example: the finding was reached by a judge or jury; any statements of culpability contained in a settlement agreement; the existence of similar complaints against the employer or a particular individual; or remedial action instituted by the contractor)
- S Name, e-mail address, and phone number of person requesting the consultation.
- S Guidance may be requested on provisional reimbursement to the contractor of its costs while the legal action is pending, but consultation on this is not required.

AL-2001-03 (05/25/01)

The GC point-of-contact, or local counsel, will review the available information and provide comments and guidance material to the individual requesting consultation within 30 days of receiving the information. The GC point-of-contact, or local counsel, will then be available for further discussion with the contracting officer after he/she has reviewed the provided guidance.

What is the Procedure for Submitting Documentation to the Office of Procurement and Assistance Management after Determinations of Allowability?

The Office of Procurement and Assistance Policy, Office of Procurement and Assistance Management, is the office designated to receive this information for both the Department and NNSA actions. The final report, in the form of an electronic copy (in Wordperfect or Microsoft Word) of the contracting officer's written final determination, must be e-mailed to: whistleblowers@hq.doe.gov. A point-of-contact in the contracting office should be provided in case further information is needed.